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August 20, 2007

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 3, 2006

Case Number: TSO-0441

This Decision concerns the eligibility of XXXXX (the individual) to hold an access authorization¹ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be granted. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be granted.

I. Background

The individual is an employee of a contractor at a DOE facility. Due to concerns about the individual's past use of alcohol, the DOE local office conducted a Personnel Security Interview (PSI) with the individual on March 6, 2006. *See* DOE Exhibit 5. Because the security concern remained unresolved after the PSI, the DOE local office requested that the individual be interviewed by a DOE consultant psychiatrist. The psychiatrist interviewed the individual on June 8, 2006. *See* DOE Exhibit 3. The DOE local office ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the DOE local office proceeded to obtain authority to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization.

¹Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

The Notification Letter included a statement of that derogatory information and informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the DOE local office forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, his supervisor, two coworkers, his wife, his parents, a long-time friend of the individual, and the DOE consultant psychiatrist. The DOE Counsel submitted exhibits prior to the hearing.

I have reviewed and carefully considered the evidence in the record. I have considered the evidence that raises a concern about the individual's eligibility to hold a DOE access authorization, as well as the evidence that mitigates that concern. I conclude, based on the evidence before me and for the reasons explained below, that the security concern in this case remains unresolved.

II. Analysis

A. The Basis for the DOE's Security Concern

As indicated above, the Notification Letter issued to the individual included a statement of the derogatory information in the possession of the DOE that created a substantial doubt regarding the individual's eligibility for access authorization. In the Notification Letter, the DOE characterized this information as indicating that the individual has been or is a user of alcohol habitually to excess, or has been diagnosed as alcohol dependent or as suffering from alcohol abuse. DOE Exhibit 1 (citing 10 C.F.R. § 710.8(j)).

These statements were based on charges against the individual of Driving While Intoxicated (DWI) in 1998 (measured blood alcohol content (BAC) of 0.21% or 0.22%) and 1999 (measured BAC of 0.18%), Minor in Possession of Alcohol in 2001, and his involvement in an alcohol-related automobile accident in 2002. *Id.* The Notification Letter also cited a June 8, 2006 report by the DOE consultant psychiatrist concluding that the individual suffered from "Alcohol Abuse, in early full remission." DOE Exhibit 3. Elaborating on his diagnosis in his hearing testimony, the DOE consultant psychiatrist stated, "the fact that he was continuing to drink and didn't think he had a problem, I thought, set him up at a high risk for having future binge drinking episodes." Hearing Transcript [hereinafter Tr.] at 22-23.

The individual does not dispute that he was involved in the four alcohol-related incidents from 1998 to 2002. As for the DOE consultant psychiatrist's diagnosis, the individual acknowledged, "I could see it [alcohol] being a factor when I was younger," though he contends that he has changed his behavior since his most recent alcohol-related incident in 2002. Tr. at 104.

[I]t is legal to drink in America. Being evaluated in that from a psychiatrist like [the DOE consultant psychiatrist], I mean, just based off of previous interviews and stuff like that, and past experiences that I -- that happened to me in the past, previously with DWIs, the alcohol incidents and all that stuff, it's kind of hard to -- to determine that I'm an alcohol abuser just by that, because it is something that happened in the past.

Tr. at 127. However, because the individual has not challenged the facts upon which the psychiatrist's diagnosis was based, nor presented any conflicting expert opinion based on those facts, I have no reason to question the validity of the diagnosis.

With or without the diagnosis, the undisputed facts in this case raise a valid concern as to whether the individual will use alcohol to excess in the future. In other DOE access authorization proceedings, Hearing Officers have consistently found that the excessive use of alcohol can impair an individual's judgment and reliability, and his ability to control impulses. These factors amplify the risk that the individual will fail to safeguard classified matter or special nuclear material. *See, e.g., Personnel Security Hearing*, Case No. TSO-0168, 29 DOE ¶ 82,807 (2005) (and cases cited therein).

B. Whether the Security Concern Has Been Resolved

A hearing under Part 710 is held "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization," i.e., "to have the substantial doubt regarding eligibility for access authorization resolved." 10 C.F.R. § 710.21(b)(3), (6). Under the Part 710 regulations, the Hearing Officer is directed to make a predictive assessment as to whether granting or restoring access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

"In resolving a question concerning an individual's eligibility for access authorization," I must consider

the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

10 C.F.R. § 710.7(c).

The application of some of these factors somewhat mitigates the security concern in this case. The individual was 16 and 17 years old, respectively, at the time of his two DWI arrests in 1998 and 1999, was 18 when he was arrested for Minor in Possession of Alcohol in 2001, and was 19 at the time of his alcohol-related automobile accident in 2002. He is now 25 years old. Thus, in his favor are the facts that he was quite young at the time of all these incidents, and over five years have passed since the most recent one. I have no reason to doubt the individual's testimony, corroborated by several of the witnesses at the hearing, that he has used alcohol more responsibly in the last five years. Tr. at 8-9, 47, 52, 56, 62-63, 69-70, 87-89, 104, 106-11.

What remains, however, is the opinion of the DOE consultant psychiatrist. Such expert testimony is very helpful in a case such as this in evaluating "the absence or presence of rehabilitation or reformation and other pertinent behavioral changes" and the ultimate issue in this case, "the likelihood of continuation or recurrence . . ." In this case, the DOE consultant psychiatrist is obviously aware of how young the individual was at the time of his alcohol-related problems, and acknowledges more recent changes in the individual's behavior.

Often drinking problems are worse when someone's younger, but not always. Alcoholism can go the other way, too, where it gets worse and worse with time. So it's difficult to say. But like you say, often it can be a result of immaturity and kind of things that happened "when I was young and crazy," that sort of excuse. That often happens, that the person matures.

. . . .

And I'm sure if I were the expert witness on behalf of [the individual], I would definitely be pointing out that these did happen when he was young and immature. He's got children now and responsibilities.

. . . .

[I]n [the individual's] case, it looks to me roughly that he's maturing as he gets older and takes the responsibilities that he's choosing, raising a son, beginning a career -- as he takes those on, he's maturing more and sounds like is controlling his drinking better, is what it appears.

Tr. at 24, 100-01. Nonetheless, based on the individual's history and the resulting diagnosis, the psychiatrist recommended "outpatient treatment of moderate intensity By moderate intensity I mean a treatment regimen such as Alcoholics Anonymous at least once per week. His treatment should include maintenance of sobriety (abstinence from alcohol). Duration of such treatment should be for a year . . ." DOE Exhibit 3. As the DOE consultant psychiatrist explained in his hearing testimony, "treatment so much increases the odds that you're going to be successful that I always recommend it . . ." Tr. at 31-32.

Contrary to these recommendations, the individual has not refrained from drinking, and in fact testified to consuming alcohol on the Thanksgiving, Christmas, and New Year's Eve prior to the hearing. Tr. at 104-05, 112. The DOE consultant psychiatrist found it significant that the individual did not heed his recommendations.

[A]nother reason I think I would raise the bar in assessing him is that he read my report and saw that at least in terms of the DOE's psychiatrist, that one of the conditions for his clearance . . . was that he be sober for a year and get into some treatment. A key thing in assessing alcohol problems is functional impairment, and that can be relative to what functions you need to perform. If you're a surgeon, for instance, you shouldn't take a drink -- one drink before you go into a surgery. Once he learned that one of the functional requirements of his job and his -- or his clearance anyway, maybe his career advancement, was that he should be sober for a year, if he thereafter is unwilling or unable to stop drinking, that says something.

Tr. at 125.²

I recognize that it may seem unfair to expect an individual to follow recommendations based on a diagnosis with which he disagrees. However, I would not draw a negative inference from an individual's failure to follow the recommendations of a DOE consultant psychiatrist if I did not find the diagnosis were valid in the first place. Conversely, I logically could not rely upon an individual's behavior in reaction to a diagnosis as *post facto* support for a diagnosis that I would otherwise find invalid. But it is troubling that the individual, in the face of a valid diagnosis, and in the absence of any reasonable basis for him to disregard that diagnosis and the resulting recommendations, has not since completely abstained from the use of alcohol.

Finally, as to the likelihood that the individual will drink to the point of intoxication (defined as a BAC of 0.08% or above) in the future, the DOE consultant psychiatrist concluded after hearing the testimony of the other witnesses, "[I]f I had to put money on it, and put down a bet, I would put my money at this point in time that he's going to have an episode of intoxication over the next year or two, given what I've heard" Tr. at 120, 123.

The weight of the evidence in the record, in particular the sole expert testimony presented at the hearing, supports a finding that the individual will likely drink to the point of intoxication in the future. Given the security concerns associated with a clearance holder under the influence of

² As noted above, I give the individual credit for using alcohol more responsibly in recent years. *Supra* p. 4; Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, Guideline H, <http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf> (December 29, 2005) (describing the establishment of a pattern of responsible use as a condition that could mitigate a security concern arising from alcohol abuse). However, a pattern of responsible use is not necessarily sufficient to fully mitigate a security concern based on alcohol abuse, particularly where a psychiatrist has recommended at least one year of complete abstinence, as in the present case.

alcohol, such a risk is not acceptable. I therefore conclude that the security concerns raised by the individual's use of alcohol have not been sufficiently resolved.

III. Conclusion

Upon consideration of the record in this case, I find that there is evidence that raises a substantial doubt regarding the individual's eligibility for a security clearance. In addition, I find that the concern raised by that evidence has not been sufficiently mitigated such that, "after consideration of all the relevant information, favorable and unfavorable," I can conclude that granting the individual's "access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. §§ 710.7(a), 710.27(a). The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: August 20, 2007